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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-746

CHARLES N. BUCHHOLTZ and LESTER J. TAUER, on behalf of themselves and all others similarly situated,

Petitioners,

vs.

SWIFT & COMPANY and AMALGAMATED MEAT CUTTERS and BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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vs.

SWIFT & COMPANY and AMALGAMATED MEAT CUTTERS and BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit reversing judgment granted by the district court, District of Minnesota, to petitioners.

OPINIONS BELOW

The revised panel opinion of the Court of Appeals (App., pp. A-5 - A-23) is unofficially reported as *Buchholtz v. Swift & Co.*, 5 Lab. L. Rep. (CCH) (87 Lab.

Cas.) ¶11,542. The Order of the Court of Appeals denying rehearing en banc (App., pp. A-26 - A-27), a dissent from the denial of rehearing en banc by Judge Lay, joined in by Judge McMillan (App., pp. A-27 - A-42), and a concurring statement in the denial of rehearing en banc by Judge Heaney, joined in by Judge Bright, (App. pp. A-42 - A-43), are unofficially reported as *Buchholtz v. Swift & Co.*, 5 Lab. L. Rep. (CCH) (87 Lab. Cas.) ¶11,543. The original panel opinion (App., pp. A-44 - A-60) is unofficially reported as *Buchholtz v. Swift & Co.*, 5 Lab. L. Rep. (CCH) (86 Lab. Cas.) ¶11,313.

The Findings of Fact, Conclusions of Law and Order for Judgment of the district court (App., pp. A-61 - A-120) is unreported.

STATEMENT OF JURISDICTION

The judgment of the court of appeals (App., pp. A-24 - A-25) was entered on September 7, 1979. The court of appeals' original panel opinion was filed on April 25, 1979. A timely motion for rehearing and suggestion that rehearing be held en banc was filed by petitioners. The Order of the Court of Appeals denying rehearing en banc was filed on September 7, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Where a union withdraws employees' contract grievance from arbitration and appropriates settlement proceeds to the use of others may employees recover damages for unfair representation from the union only if they prevail against the company on the contract claim?

2. Whether a union breaches its duty of fair representation to its former members when it trades their grievance claim for wages in return for an equivalent amount of gratuitous pension benefits for present members?

3. Whether employers may close a plant and terminate employees who have satisfied credited service requirements for vacation pay and deny such pay by timing the closing to avoid what is claimed to be an eligibility date?

4. Whether review of a contract claim is properly treated as an issue of pure law where the district court, acting as substitute for arbitration, makes findings of fact that resolve the claim with reference to traditional arbitral practice and authority?

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in this case, reproduced in the Appendix at pp. A-1 - A-5, are:

Labor-Management Relations Act § 301 (29 U.S.C. § 185)

National Labor Relations Act §§ 7, 8(b)(1), (2), and 9(a) (29 U.S.C. §§ 157, 158(b)(1), (2), and 159(a))
28 U.S.C. § 1337.

STATEMENT OF CASE

This class suit was commenced by petitioners in November 1971 against Swift & Co. (hereinafter Swift or Company) and The Amalgamated Meat Cutters and Butcher Workmen of North America[1] (hereinafter Amal-

[1]Amalgamated, on June 6, 1979, merged with the Retail Clerks International Union. The successor union is the United Food and Commercial Workers International Union (UFCW), the largest union within the AFL-CIO with approximately 1,200,000 members and locals in every state.

gamated or the Union). The jurisdiction of the district court was invoked under 29 U.S.C. § 185, and under 29 U.S.C. §§ 157, 158, 159 and 28 U.S.C. § 1337. The suit arises out of the closing by Swift of one of its largest and oldest plants, in two phases. The first phase occurred on November 29, 1969, and resulted in the termination of some 1,500 hourly employees, more than 1,000 of whom comprise petitioner class. Several small departments were continued, employing 200-250 hourly workers. Amalgamated represented all the above employees, who were also members of its Local Union P-167 and a parallel private club, Club 167. When petitioners were discharged in 1969, their Union membership ended, and local P-167 thereafter consisted of the remaining 200-250 employees. Most petitioners did continue their membership in the private club and a running dispute developed between Amalgamated and petitioners over this fact and other matters relating to the club.

Under the labor agreement between Swift and Amalgamated, annual vacations were earned and distributed, year-to-year, on the basis of a "vacation year" running from December 28 to the subsequent December 27. The vacation provisions (App., pp. A-64 - A-65) provide that "Vacation eligibility requirements are based on credited service." The various formulas for calculating credited service as of December 28 contain a proviso that the employee be on the active payroll on that date. When petitioners were terminated on November 29, most of them had earned sufficient credited service since the last December to be eligible on that basis for a full vacation, but Swift's timing made it impossible for them to be on the active payroll twenty-nine days later on December 28, or

thereafter. Swift purposely moved its closing arrangements along to ensure that this impossibility would exist (App. p. A-69). (II R 747, 748, 750; V R 2340, 2341)[2] and refused to pay vacations demanded by the Union on the ground that petitioners would not be on the payroll on December 28.

The local union filed a grievance. Petitioners were knowledgeable of a similar closing on December 21, a year earlier, in Sioux City, Iowa, and that Amalgamated had in that case reached a settlement with Swift in which vacations were paid the employees. Amalgamated advised petitioners not to use the leverage employed by the Sioux City employees—threatened transfers to nearby plants so as to be on the payroll on the one day—assuring petitioners that their case would be arbitrated.[3] (III R 968, 969, 1154-56). Amalgamated official Charles Fischer told petitioners that he thought they had a "good" grievance, and that the Union had won a similar case against another meat packer, Wilson & Co. (IV R 1844-45, 1864).

The grievance moved slowly from readiness for the fourth step (December 1969) to the fifth step, arbitration, scheduled for April 28, 1971—a Wednesday. As a result of an injury sustained by Company representative Tagg on Sunday, April 25, the arbitration of petitioners' grievance, one of four scheduled for arbitration, was postponed until June 23, 1971. Petitioners' grievance had a potential value of $1,053,688 (VI R 2975).

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[2]The record in the court of appeals consisted of volumes numbered I through VI and will be referenced herein in this fashion. References to the separately printed Appendix to this petition will be as "App."

[3]Amalgamated's president in a letter to class petitioner Tauer of January 29, 1971, assured petitioners that the vacation pay grievance would be arbitrated. (V R 2378).

The Settlement or "Swap"

The "swap" of petitioners' grievance, foreclosing arbitration, is at the heart of this case. The facts are not disputed. On May 29, 1971, one month after postponement of the scheduled arbitration, Swift announced that it would close the remainder of the plant and terminate the remaining employees who comprised the Local Union. Within days, a meeting was arranged in Chicago between Swift, Amalgamated and local representatives to discuss "settlement" of four grievances, including petitioners' vacation pay grievance. The meeting occurred on June 7, 1971. Local Union representatives wanted to obtain special "pension-type" benefits for remaining employees and Union members who would be less than 55 upon their termination. It was never contended by anyone that there was even a colorable claim to such benefits under the labor agreement, and Amalgamated conceded that such benefits were extra-contractual. (III R 1340-41).

At this first meeting the Union withheld the vacation grievance and received an offer of $8,000 cash to settle the three other grievances. (III R 1218-19). Union official Fischer advised the local officers that unless petitioners' grievance was included, they would not be in a good position to gain pension-type and hospitalization benefits for their group. (III R 1344-46. At a second meeting, on June 18, 1971, five days before its scheduled arbitration, Amalgamated offered petitioners' grievance together with the other three; Fischer said it was then that "heavy bargaining" began, culminating in the settlement agreement. (III R 1346-47). Petitioners' grievance was withdrawn

"with prejudice," but "without precedent"[4] concerning its underlying merits. (VI R 2472-78). In return Swift agreed to provide special pension-type benefits and hospitalization coverage to sixty-seven Local Union members, including three who participated in the negotiations. The value of these benefits was $928,000. (IV R 1702-06).

The "swap" was ratified by a vote of the then Local Union's membership, including the beneficiaries. Petitioners, whose Union membership had ended eighteen months before, were not consulted or permitted to participate. Petitioners sought to protest the use of their grievance as bargaining material. Local Union President Sylvester said he

> [Told Mr. Buchholtz that I did not want him telling the Local what to do about the grievance because I considered it the property of the Local Union]. . . . And I told our people that this was a Local Union grievance, that we would have to handle it, we would have to push it, settle it. Whatever we did with it would be a Local Union thing to do with it. *People from outside* shouldn't be telling us what to do, or how to handle it. . . . [I told] Mr. Buchholtz and others, in substance, not to tell [me] what to do because it was the Union's grievance, it was the *property* of the Union.

(III R 1408) (Emphasis added).

Proceedings Below

In petitioners' suit for contract damages and for damages flowing from the Union's alleged unfair representation, liability and damages issues were bifurcated for trial.

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[4]The South St. Paul closing was one of many plant and department closings that Swift had effected or scheduled as a part of a long range plan.

After an eight-day trial the district court found in favor of petitioners against both defendants. With respect to Amalgamated's conduct, the district court found that it had processed petitioners' meritorious grievance in a perfunctory fashion; that it had acted in bad faith and settled the grievance, not because it believed it lacked merit, but because it had settlement value based on merit; that the settlement by which sixty-seven Union members with no claim reaped the settlement value of a grievance for earned wages filed for over 1,000 former Union members was arbitrary and, indeed, reflected a failure of the Union to represent petitioners at all; and that the settlement was the product of discrimination against petitioners because of their nonmembership in the Union and was motivated by a hostile animus toward petitioner by Amalgamated, borne of dispute between the latter and Club 167. (App. pp. A-82 - A-100).

On the issue of liability for vacation pay, the district court ruled in favor of a majority of petitioners' class on three separate bases. First, the court reasoned that presence on the payroll on one day was no part of the service by which vacation pay was earned, and was designed to perform administrative purposes relevant in an ongoing plant, but not to a close-down situation. Second, the court reasoned that the employer could not unilaterally render a condition impossible to meet and then assert failure of that condition as justification for nonpayment of wages earned by service already performed. Third, the court found that Swift, by deliberately timing the closing after credited service would be earned by almost all employees, but before December 28, had violated paragraph 10 of

the labor agreement, which provided that the Company would not use reserved powers to "avoid any other provision of this Agreement." (App., pp. A-67 - A-73.)

The district court made detailed findings (App., pp. A-72 - A-73) concerning the parties' bargaining history and past practices. Those findings are described in part in the Dissenting Statement of Judges Lay and McMillian. (App. A-31 - A-32). The court considered a number of arbitration and judicial authorities awarding vacations in similar circumstances. These included the Sixth Circuit's opinion in *Local 186, United Packinghouse Food & Allied Workers v. Armour & Co.*, 446 F.2d 610 (1971), *cert. denied*, 405 U.S. 955 (1972), and the *Wilson Co.* arbitration case. (App., pp. A-121 - A-129) (unpublished opinion). Both cases involved identical issues, the same industry and the same Union as the present case.[5]

Damages and subclass issues were determined in 1977-78, and on July 8, 1978, $574,349 in vacation pay and $34,460 in prejudgment interest were awarded to a majority of petitioner class as against Swift. As against Amalgamated the court awarded $224,515 in prejudgment interest on the vacation claims, and $287,004 in attorneys' fees was awarded all of petitioner class, as damages, for unfair representation.

On appeal a panel of the Eighth Circuit in its original opinion characterized the whole case as a § 301 action, "reached a different conclusion" on the contract claim, and directed dismissal of petitioners' case against both respondents. (App., pp. A-45; A-51; A-60). It did not address "substantial issues" of unfair representation because it

[5]The United Packinghouse Workers represented Swift's employees. It merged with Amalgamated in 1968.

held that to recover against the Union the petitioners had to show a breach of contract by the Company. This conclusion was based solely on language from *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 570 (1976): "To prevail against either the company or the union, petitioner must not only show that their *discharge was contrary to the contract* but must also carry the burden of demonstrating breach of duty by the Union." (App., p. A-51) (Emphasis by court below).

On denial of petitioners' Petition for Rehearing En Banc, the panel revised its opinion by adding a brief analysis of the Union's liability. It said: "[W]e hold that because there was no contractual obligation on the part of Swift to pay the vacation pay, that under the circumstances of this case and considering the duty of the union to fairly represent the older employees too, the union could not be held guilty of unfair representation." (App., p. A-21 - A-22). Again, the language from *Hines*, with added emphasis to the element of contract breach by the employer, was the sole citation. "Alternatively" the court ruled that even if petitioners' grievance might have been won at arbitration, where the Union "is also pressing claims for other employees which are arguably meritorious," and no clear showing of bad faith is made, it cannot be said the Union unfairly represented petitioners. (App., p. A-22). The court rejected the district court's factual finding of bad faith, saying that the "cornerstone" of its finding was its conclusion on the contract merits, and that they disagreed with that conclusion "as a matter of law." (App. p. A-23). The circuit court concluded that the Union "used its best judgment to obtain the maximum benefit for the largest number of its membership." (App., p. A-23).

In a brief Concurring Statement upon Denial of Petition for Rehearing En Banc, Judges Heaney and Bright disagreed with the panel on the merits of the contract claim, but they agreed with the panel's alternate holding, which legitimized the Union's settlement of petitioners' grievance (i.e., the "swap").

A Dissenting Statement upon Denial of Petition for Rehearing En Banc was filed by Judge Lay and joined by Judge McMillian. These judges strongly disagreed with the panel on both the contract and the unfair representation claims of petitioners, and they outlined four "compelling reasons" for the court to reconsider en banc the panel's decision. The Dissenting Statement contains an analysis of petitioners' claims, notes that the unfair representation claim has a basis in federal jurisdiction independent of LMRA § 301, and relates the fact-finding of the district court in some detail, particularly as it bears on the nature of the "swap," the basis for its finding of bad faith, and the factual underpinning of its ruling on the contract merits. With respect to the "swap," the dissenting judges twice point out that the benefits received by Union members from the trade-off of petitioners' grievance were conceded by the union to be "extra-contractual."

REASONS FOR GRANTING THE WRIT

The Court of Appeals' Decision on the Unfair Representation Claim Is in Direct Conflict with the Decisions of This Court and the Decisions of Other United States Courts of Appeal

On facts that are undisputed, the court of appeals legitimized the Union's use of a $1,053,000 claim of former

union members for earned wages to buy $920,000 worth of extra-contractual benefits for its then members. The court justified its result by its reading of *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976), and, in rationalizing the result, the court rendered the "arbitrary" conduct standard of unfair representation meaningless and reasoned backwards from its conclusion on the merits of petitioners' contract claim to a characterization of the Union's conduct eight years earlier, all in direct conflict with *Vaca v. Sipes*, 386 U.S. 171 (1967). The judicial review afforded in this case departs from the traditional modes of review of a district court's proceedings.

In its original opinion, the court of appeals reversed petitioners' judgment against Swift, and then, relying exclusively on language from *Hines*, ruled that if petitioners could not recover against Swift, they could not recover against Amalgamated. The quoted language from *Hines* was:

> To prevail against either the company or the union, petitioners must not only show that their *discharge was contrary to the contract* but must also carry the burden of demonstrating breach of duty by the union.

(App., p. A-51) (Emphasis in original). In its revised opinion, the Court of Appeals added a brief analysis of the Union's liability and duty, and concluded that the Union could not have breached its duty. Again, sole reliance for authority was placed on the same language, with the same emphasis, from *Hines*. In both opinions, the court stated that jurisdiction of petitioners' claim against Amalgamated was based on LMRA § 301, though petitioners pleaded a jurisdictional basis for their separate cause of action against the union in 28 U.S.C. § 1337.

Petitioners will show below that the appellate court's ultimate conclusion on the contract claim in this case controlled its disposition of petitioners' case against Amalgamated. But first, petitioners address the meaning of this Court's language in the *Hines* case, language that petitioners contend led the court of appeals to a fundamentally important misconception of both the nature of a union's duty of fair representation, and the nature of a cause of action for breach of duty.

In *Hines*, this Court limited its view to a single question of whether or not employees could claim under LMRA § 301 for *wrongful discharge* even though they had lost in *arbitration*, if they could show inadequate representation during arbitration by their union. 424 U.S. at 561, n. 7. The claim under § 301 was a contract claim. The Court was answering an assertion that any recovery would undermine the finality of arbitration, which had determined the contract issue of discharge. In that type of case, to warrant disturbing the result of arbitration, it would have to be shown that the union's alleged failures were prejudicial. But even more clearly, to recover against the union for *wrongful discharge*, the employees would have to show wrongful discharge, and any such recovery would be an apportionment of damages between the union and the company on the contract claim.

Petitioners do not believe that this Court intended in *Hines* to reverse its thirty-five year long recognition of a federal cause of action for unfair representation. *Czosek v. O'Mara*, 397 U.S. 25 (1970); *Vaca v. Sipes*, 386 U.S. 171 (1967); *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953); *Steele v. Louisville & N.R. Co.*, 323 U.S. 192 (1944). In the context of grievance administration, several

courts of appeal have recognized that if an employee is injured by his union's unfair representation, recovery may be had even though the employee could not recover on an underlying contract claim against the employer.[6] It is one of the firmest traditions of American law, going back at least to the decision of *Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803), that where there is injury from the violation of a right, there should be a remedy. Where employees prove unfair representation, the only remaining question should be whether they suffered injury from the union's wrong. If petitioners are not entitled to vacation pay from Swift in their § 301 action, they are not entitled to interest, as such, from Amalgamated on unpaid vacation pay, as an apportionment of damages in their § 301 action. *Vaca v. Sipes,* 386 U.S. 171 (1967). That is hardly to say, however, that they were not injured by their union's wrongful appropriation of the settlement value of their vacation claim, which forced them from the forum of cost-free and relatively simple and prompt arbitration to the full gamut of a federal trial, with its attendant costs, where they faced an alignment and the combined resources of their former union and employer.

The district court awarded, as damages, the attorneys' fees and costs incurred in the litigation of petitioners' contact claim. As the Sixth Circuit said in *Scott v. Local 377, International Brotherhood of Teamsters,* 548 F.2d 1244, 1246, *cert. denied,* 431 U.S. 968 (1977):

[6]*See, e.g.*, Kaiser v. Local 83, International Bhd. of Teamsters, 577 F.2d 642 (9th Cir. 1978); Robesky v. Qantas Empire Airways Ltd., 573 F.2d 1082 (9th Cir. 1978); Minnis v. International Union, UAW, 531 F.2d 850 (8th Cir. 1975); Mumford v. Glover, 503 F.2d 872 (5th Cir. 1974).

> A different situation is presented, however, in his action against the Union, for in that action the principal element of Scott's damages is the amount which it cost him in attorney fees and other expenses to do that which the Union was obliged but failed to do on his behalf.

That the court of appeals ultimately resolved petitioners' contract claim against them did not diminish their right, under *Vaca* to have it resolved.

Furthermore, the Dissenting Statement observes (App., p. A-41 - A-42):

> Here there is no problem measuring damages. The record is clear that, until it agreed to "throw-in" plaintiffs' vacation pay grievances, Swift had made a cash offer of only $8,000 to settle the grievances. When the vacation pay grievances were included in the settlement negotiations, the grievances were settled, Swift agreeing to provide benefits to the remaining members of the union which it valued at $928,200. Thus even assuming the plaintiffs were not entitled by virtue of the collective bargaining agreement to vacation pay, they were entitled to the value of the grievances relating thereto, which the union arbitrarily and in bad faith traded for pension and other financial benefits for the remaining members of the union. On these facts one need not be clairvoyant to determine the damages plaintiffs are entitled to recover due to the union's breach of its duty of fair representation.

In any other context, this type of trade would not be tolerated. Assume the situation where an injured plaintiff has a claim where liability is disputed. It seems not to require explanation that a lawyer could not settle that

claim and turn the benefits of the bargain over to some third person who had no claim of any kind. The argument that the injured plaintiff had not been damaged because his case, if tried, would have been lost, is clearly invalid. Regardless of the ultimate determination on the merits, the claim had value at the time of the settlement and the injured person is entitled to that value. Similarly in this case, the vacation pay grievance was traded because at the time of the trade it had value (almost $1,000,000 as measured by the consideration for the dismissal) and that value cannot fairly be given to the present union members who had no claim for payments or benefits of any kind.

While this Court has just ruled, 5-4, in *International Brotherhood of Electrical Workers v. Foust*, — U.S. —, 99 S. Ct, 2121 (1979), that punitive damages may not be recovered in an unfair representation suit, all the Justices would seem to agree that "the fundamental purpose of fair representation suits is to compensate for injuries caused by violations of employees' rights" and that "relief in each case should be fashioned to make the injured employee whole." — U.S. at —, 99 S. Ct. at 2126.[7]

The controlling influence of *Hines* in the revised opinion of the court of appeals is made explicit in the one state-

[7]Petitioners pursued theories of restitution and unjust enrichment in the district court. When the district judge awarded the cost of pursuing their claim to all petitioners and vacation pay plus delay damages in the form of interest, apportioned to the defendants, to those petitioners whose vacation pay claims were upheld, the underpinning for further pursuit of *compensatory* remedies was essentially removed. Counsel for petitioners did file a cross appeal on behalf of those members of petitioner class denied vacation pay and interest by the district court. In their timely Petition for Rehearing En Banc, petitioners renewed their claim that if the court would not permit recovery of vacation pay, petitioners were entitled to the settlement value of their vacation pay grievance whether or not the theory was one of restitution or one of damages.

ment of the court's holding where it speaks to the Union's "liability" and isolates the lack of a contractual obligation on the part of Swift as the controlling factor, citing *Hines*. In an "alternative" holding the court concludes that the Union did not violate its duty of fair representation, but the quality of review and what the court said and left unsaid in this branch of its opinion are difficult to explain on any other grounds than that the court felt compelled by a belief that the Union could not be *liable*, in the absence of contract breach, to conclude that the Union could not be *guilty* of unfair representation.

Application of the alternative holding is dependent on the absence of bad faith by the Union. The trial court found as fact that the Union acted in bad faith. But the court of appeals rejected this finding solely on the basis of its disagreement with the district judge, as a "matter of law," on the merits of the contract issue, saying that this issue was the "cornerstone" of the trial court's finding. A cursory examination of the findings of fact will show that the district judge based his finding on the totality of circumstances, of which the most important were the nature and circumstances of the settlement or "swap." But demonstrating beyond cavil that the district judge did not draw his factual finding of bad faith from his conclusion on the merits of the contract claim is the fact that he found that the Union acted unfairly and in bad faith towards *all* of petitioner class, while finding in favor only of *some* of petitioner class with respect to the claim against Swift. The Dissenting Statement analyzes the issue of bad faith at some length and concludes: "The panel decision fails to recognize the evidence from which a learned and experienced district judge found bad faith of the union."

The court of appeals did not address at all the separate findings of fact by the district court: That the Union discriminated against the petitioners because of their non-membership in the Union, and in favor of the settlement beneficiaries because of their membership; that the Union was motivated by a hostile animus towards petitioners; and that the Union was motivated not by an assessment that petitioners' grievance had settlement value grounded in its merits, but by its assessment that the grievance had settlement value grounded in its merit.

The substance of the alternative holding of the court of appeals was that the Union's conduct was not arbitrary because the Union's withdrawal of petitioners' grievance resolved conflict between their grievance and the "rights of the older employees" who had claims that were "arguably meritorious." In this connection it is imperative that one not lose sight of what happened when petitioners' grievance was traded away. The historical facts of the "swap" are not disputed and are correctly described in the Dissenting Statement. The above characterizations by the court of appeals are not only utterly devoid of factual support in the record, they contradict the record. *See Thompson v. City of Louisville*, 362 U.S. 199 (1960). The Dissenting Statement twice points out what petitioners have stressed throughout: The union *conceded* that the beneficiaries of the settlement sought and received special benefits that had no foundation whatever in the labor agreement. The total foundation for their "claims" was their desire for unique benefits. Nor has it ever been suggested prior to review below that this case somehow involved conflict between older and younger employees. A

sub-class of the petitioner class had with it more employees who in 1969 were older than the settlement beneficiaries were in 197'. It was the relative youth of the beneficiaries that led them to seek pension-type benefits that were not provided by the labor agreement. Members of petitioner class who were of equal age when they terminated received no such benefits. Conflict was real; but it was conflict between Union members, who wanted very costly benefits that could be obtained only by exercising control over petitioners' grievance, and petitioners, who as former Union members—"outsiders"— could exercise no control over the disposition of their grievance.

The Dissenting Statement says of the court's analyses:

> The panel decision, which gives only perfunctory attention to the unfair representation claim apart from the contract discussion, reflects either abandonment of the court's "traditional supervisory jurisdiction," [Citing *Vaca v. Sipes*, 386 U.S. 171, 182] or a fundamental misconception of the nature of unfair representation suits.

The court of appeals did not cite any case or explain any factor or need peculiar to labor-management relations that would explain the legitimation of conduct that surely would be condemned in all other walks of life. *Vaca* permitted unions to control grievance and arbitration procedures, subject to a duty of fairness, for reasons solidly grounded in the labor-management relation and in conditions necessary to the viability of arbitration as a preferred federal forum for the resolution of disputes. The

arbitration process between Swift and Amalgamated has seldom been used and thus was hardly overburdened.[8] In any event, petitioners did not present a situation in which hundreds of small separate claims pressed for attention. Arbitration of their grievance was scheduled to take a maximum of two days and would have resolved the common claim of more than 1,000 employees.

Mr. Justice White said in *Humphrey v. Moore,* 375 U. S. 335, 350 (1964), that "conflict between employees represented by the same union is a recurring fact." He also said in *Vaca v. Sipes,* 386 U.S. at 193, that the duty of fair representation "protects the individual employee from arbitrary abuses of the settlement device." The resolution of true conflict, as in *Humphrey v. Moore,* where a seniority dispute was involved, and the temptation to engage in "horsetrading" may be among the most common problems faced by unions in their administration of collective bargaining agreements. Because the problems are so important and recur so frequently,[9] guidance is needed. So

[8]Swift pointed out in its brief below at p. 45 that only four grievances were arbitrated between the parties during the years 1970-1975. *See also* Vaca v. Sipes, 386 U.S. at 192 n. 15, indicating that only one of 967 grievances filed at all of Swift's plants between September 1961 and October 1963 was taken to arbitration.

[9]The problem of "horsetrading" has been isolated and commented on by the leading authors in the field of labor law. Summers, *The Individual Employee's Rights Under the Collective Agreement: What Constitutes Fair Representation?,* 1260 Pa. L. Rev. 251 (1977) (grievance horsetrading is "rankest form of arbitrary and discriminatory conduct"); Summers, *Individual Rights In Collective Agreements & Arbitration,* 37 N.Y.U. L. Rev. 362 (1962) (danger of unfairness to the individual in grievance handling by the union can be substantial; "horsetrading in grievances can become common-place); *see* Cox, *Rights Under A Labor Agreement,* 69 Harv. L. Rev. 601 (1956) (giving exclusive control of grievance procedure to bargaining representative entails risk to employee as "the temptation [to the union] to engage in 'horsetrading' is not inconsiderable."); Cox, *The Duty of Fair Representation,* 2 Vill. L. Rev. 151 (1957) (in judging whether settlement of one party's grievance for benefits to another party is "unfair" one should take into account evidence of discrimination or arbitrary "horsetrading").

far, where trade-offs have been permitted by the courts of appeal, the facts have borne little resemblance to the present case, and some values peculiar to the labor-management relation have been present. Nevertheless, the courts have warned that "sheer favoritism" will not be permitted, *Simberlund v. Long Island R.R.,* 421 F.2d 1219, 1227 (2d Cir. 1970); that "the deliberate sacrifice of a particular employee as consideration for other objectives must be a concession the union cannot make," *Local 13, International Longshoremen's Union v. Pacific Maritime Ass'n,* 441 F.2d 1061, 1068 (9th Cir. 1971), *cert. denied,* 404 U.S. 1016 (1972); and that a union may not discriminate against those it represents on the basis of their political power or lack thereof within the union. *Truck Drivers & Helpers, Local 568 v. NLRB,* 379 F.2d 137 (D.C. Cir. 1967); *Gainey v. Brotherhood of Railway & Steamship Clerks,* 313 F.2d 318 (3d Cir. 1963); *Ferro v. Railway Express Agency, Inc.,* 296 F.2d 847 (2d Cir. 1961).

The Decision of the Court of Appeals on the Merits of the Contract Claim Is in Direct Conflict with the Decisions of The United States Court of Appeals for the Sixth Circuit

The district judge resolved petitioners' contract claim, sitting as a substitute for arbitration, and based his decision on a series of fact findings in addition to contract language analysis. The court of appeals approached the merits purely as a "matter of law," made a fully independent appraisal, including its own fact finding, and reversed the district court without deference to its conclusions. In doing so, the court ignored arbitral and judicial cases in the same industry, raising the same issues, and involving

the same union as in the present case. The court acknowledged conflict between its decision and several cases from the Sixth Circuit, saying "We choose not to follow that line of authority."

On denial of a petition for rehearing en banc, four additional judges on the Eighth Circuit stated an opinion on the merits of petitioners' claim against Swift. All four disagreed on this issue with the two circuit judges who participated in the panel's decision. The Dissenting Statement summarizes some of the district court's fact-finding and reasoning on the merits of the contract claim, and observes that "the panel decision is contrary to existing federal law and basic contract principles governing collective bargaining agreements."

The labor agreement provided that "vacation eligibility requirements are based on credited service," and most of petitioner class had earned credited service for a full vacation in 1970 by work performed in 1969. The district court found that Swift timed the closing of the plant to prevent petitioner class from being on the payroll on December 28. (App., p. A-69). Swift denied vacation payment for that reason, claiming that presence on the payroll on the one day was an additional condition of eligibility. The question on the merits was whether in these circumstances Swift could cause vacations earned as part of the annual wage package to be forfeited. This question has arisen numerous times in the past. One of the principal cases in the Sixth Circuit, *Local 186, United Packinghouse Food & Allied Workers v. Armour & Co.*, 446 F.2d 610 (1971), *cert. denied*, 405 U.S. 955 (1972), raised the same basic issue in the same industry and involved a local of the same union involved in this case, as the predecessor

of Amalgamated. Armour made the same type of argument as Swift, particularly including an argument that never in previous plant closings had it paid vacation pay to any employee unless the employee was employed on January 1. In *Armour* the union was seeking vacations. The case was pending before the Sixth Circuit when Amalgamated traded away petitioners' grievance in the present case. Vacations were awarded and the Sixth Circuit noted the approach taken in labor arbitration: "*When situations such as this have arisen in the past, they have almost uniformly been resolved in the union's favor.*" 446 F.2d at 613. (Emphasis added.) The court cited *North Star Woolen Mill Co.*, 14 Lab. Arb. Rep. (BNA) 185 (1950) (Rader, Arb.); *L. Hyman Co.*, 13 Lab. Arb. Rep. (BNA) 800 (1949) (Brecht, Arb.); *Mays Landing Water Power Co.*, 12 Lab. Arb. Rep. (BNA) 860 (1949) (Brecht, Arb.). The Court of Appeals did not discuss the *Armour* case or even acknowledge it by citation.

Additional Sixth Circuit cases directly in point are *Schneider v. Electric Auto-Lite Co.*, 456 F.2d 366 (1972) ("in the active employ of the Company . . . on December 31"); *Baldwin-Montrose Chemical Co. v. International Union, United Rubber, Cork, Linoleum & Plastic Workers*, 383 F.2d 796 (1967).[10]

District Judge Larson made findings of fact concerning

[10]A sampling of additional arbitration cases directly in point: Tobe Deutschmann Corp., 35 Lab. Arb. Rep. (BNA) 179 (1960) (Wallen, Arb.) ("in the employ of the employer" as of April 1); Vulcan Corp., 28 Lab. Arb. Rep. (BNA) 633 (1957) (Howlett, Arb.) ("on the Company payroll as of May 31, 1956"); Wamsutta Mills, Inc., 34 Lab. Arb. Rep. (BNA) 158 (1959) ("in the employ of the employer's mill on June 1 . . . hereinafter called the 'eligibility date.' ") The arbitrator in *Wamsutta Mills* summarized reasoning found in twenty-nine earlier arbitration cases in the industry, which he said showed "marked uniformity" and demonstrated "a long line of decisions in favor of the union's position." 34 Lab. Arb. Rep. (BNA) at 162-163.

the arsenal of arbitral and judicial precedents strongly supporting petitioners' claim, including those cited in this petition. These cases were not offered solely as precedents in the common law tradition; they were offered as facts and became the basis for fact-finding, principally about how arbitrators approach cases similar to petitioners'. Besides reaching his own conclusion on the merits, Judge Larson found that petitioners' claim "would probably have been upheld by an arbitrator."

A critically significant fact and precedent in the pattern of cases considered by the district court was the *Wilson Co.* arbitration (App., pp. A-121 - A-129) (unreported), a case on all fours with the present case and involving the same industry and the present Union defendant. The Union sought vacations for the Wilson employees. Though arbitrator John Larkin accepted as proven the company's contention that for twenty years the parties' practice was not to grant vacations in plant closings preceding an "eligibility" date, he awarded vacations nonetheless, emphasizing the employer's control over and selection of the closing date. He also found violation of paragraph 9 of the labor agreement, which provided that powers reserved to the company would "not be used . . . *to avoid any other provisions of the Agreement.*" (Emphasis by the arbitrator.) In the present case the district court found that Swift's deliberate choice of closing date violated paragraph 10 of the labor agreement, which provided that powers reserved to management would "not be used . . . to avoid any of the provisions of this Agreement." (App., p. A-72).

As was true of the *Armour* case, the court of appeals neither discussed nor acknowledged by citation the existence of the *Wilson Co.* arbitration. And the court did not

discuss paragraph 10 of the Swift labor agreement, or address the district court's finding of fact concerning the probable outcome of an arbitration of petitioners' grievance. The present case, as decided, stands alone in the industry represented by Amalgamated, as one in which the claim of vacation entitlement was subjected to a hearing and was denied.

In reversing the district court, the court of appeals said: "We base our differing interpretation on the actual practice of the parties under the agreement, the bargaining history, and an alternative line of judicial and arbitral authority." The district judge fully analyzed practice and bargaining history and observed the witnesses, parts of whose testimony are referenced by the court of appeals. The Dissenting Statement describes the district court's findings and states that "Judge Larson's specific findings and the record dispute" the conclusions of the panel opinion of the court of appeals.

No alternative line of judicial authority was discussed by the appellate court. The principal arbitration case upon which the court relied involved a sale, as the court acknowledged, and circumstances that the arbitrator said created weaker "equities" than a close-down. *Kroger Co.*, 74-2 Lab. Arb. Awards ¶8633, at p. 5371 (1975) (Goetz, Arb.). Aside from references to dictum in two cases, where vacations were awarded, only two arbitration cases in point were cited. In one, the arbitrator confined himself to a limited issue as presented by the union's business agent. *American Zinc Co.*, 57 Lab. Arb. Rep. (BNA) 1140 (1971) (Ray, Arb.). In the other, the arbitrator expressed an unusually literal approach to the question, alluding to none of the considerations disclosed by the arbitral author-

ity referenced above. *Duquesne Brewing Co.*, 60 Lab. Arb. Rep. (BNA) 643 (1973) (Altrock, Arb.)

The Court of Appeals' Scope of Review Was Contrary to the Principle That Arbitration Is the Federally Preferred Method of Grievance Administration

The issue presented by conflict among the circuits is inseparable from issues concerning the appropriate standard of review, issues of fundamental importance to the effectuation of labor policies articulated by this Court in *Vaca v. Sipes,* 386 U,S. 171 (1967), and this Court's 1960 Trilogy of cases.[11] In a nutshell the problem is this: the court of appeals could create conflict among the circuits concerning applicable principles of construction (stated at a high level of generalization) only because it approached the issue as a legal one as to which no deference was owing the district court's findings and conclusions. If the appellate court's approach was proper, an important need to resolve conflict in the fashioning of federal law under LMRA § 301 is presented. As shown above, however, the court reviewed and reached a different conclusion on many "facts" in the course of its resolution of the contract issue, because the contract was a collective bargaining agreement. Yet no deference to the observance of witnesses and fact-finding by the district court was given. Moreover, though the federal district judge became a substitute for arbitration that petitioners were wrongfully denied, *see Vaca v. Sipes,* 386 U.S. 171 (1967), and was described in the Dissenting Statement as

[11]United Steel Workers v. Enterprise Wheel & Car Corp., 363 U S 593 (1960); United Steel Workers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steel Workers v. American Mfg. Co., 363 U.S. 564 (1960).

a "learned and experienced district judge," the court of appeals accorded his judgment no weight, while a mere arbitrator's similar judgment would have been essentially unreviewable. *See United Steel Workers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

Arbitration of petitioners' grievance was scheduled to take a maximum of two days. They were entitled to union representation at no cost beyond dues earlier paid. Forced to seek the protection of a court under *Vaca,* and with their former union aligned against them, petitioners fully developed a trial record. As Swift points out in its brief below at pp. 1-2: "The district court proceedings extended over seven years. . . . Each party submitted hundreds of pages of briefs to the district court. . . The district court's findings of fact and conclusions of law are over fifty pages in length."

Yet it seems clear that at the end of this road a second, independent appraisal of petitioners' claim was made even though that involved the court of appeals in essentially de novo fact finding. Thus, under the approach of the court of appeals, the "bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal law," *Vaca v. Sipes,* 386 U.S. at 182, becomes a right to have cost-free, relatively simple arbitration, with union representation, replaced by the full gamut of the federal judicial system in which the petitioners must survive two and potentially three (including this Court) independent appraisals of their claim, upon a record largely factual, and in the face of the combined resources of one of the country's largest unions and one of its largest companies.

Because the proper application of a collective bargaining agreement may require factual inquiries that go beyond the four corners of the agreement, and because in the present case the district judge resolved the contract issue as a substitute for an arbitrator, the case presents questions concerning the appropriate standard of review on the merits of the contract claim. These issues will be present in virtually every unfair representation/ § 301 case modeled on the teaching of *Vaca*. The issues and their implications for the sensible effectuation of important labor policies emerge with unusual clarity on the record in this case.

Considering the decision below on its own terms, conflict with the Sixth Circuit was acknowledged. Respondents may contend that the case involves merely a matter of contract interpretation, not worthy of this Court's attention. But the more that idea is pressed, the more concern there should be for the standard of review employed by the court of appeals. In any event, the court of appeals, by rejecting principles of construction fashioned by the Sixth Circuit, fashioned its own principles at an equally high level of generalization, principles that ostensibly are to apply within the Eighth Circuit. In appropriate cases the federal courts are to "fashion" "substantive law to apply in suits under 301(a)." *Textile Workers Union v. Lincoln Mills,* 353 U.S. 448 (1957). And this Court has not shrunk from the task of supervising the development of appropriate principles of construction under § 301.[12]

As the Dissenting Statement points out, the panel decision is contrary to the weight of federal authority. The

[12]Walsh v. Schlecht, 429 U.S. 401 (1977); Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962); United Steel Workers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

matter of justice to the large petitioner class involved in this case is not a trivial one. But plant closings are not uncommon across the land and by their nature affect employees wholesale and involuntarily. To the extent principles of construction announced by the federal courts control the outcome of what is obviously a recurring fact-pattern in plant closings, there should not be one rule of construction in one circuit and another rule in another circuit. This is particularly a matter of concern when it is remembered that most unions, as is certainly the case with respect to Amalgamated, represent employees on a national scale, crossing circuit boundaries even with respect to one employer as large as Swift. *Cf. Corning Glass Works v. Brennan,* 417 U.S. 188, 190-191 (1974) (conduct of employer, who's plants crossed circuit lines, held proper in one circuit, but improper in another.)

CONCLUSION

The record in this case presents with unusual clarity issues of long-term importance to employers and unions—an import that is read against the background of federal policy and the federal judicial system "as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." *Vaca v. Sipes,* 386 U.S. at 182. If the federally created remedy for such conduct is to operate effectively, that is, by providing the union and the employer with the incentive to avoid the necessity for resort by employees to the federal judicial system, guidance by this Court is required.

The opinion of the court of appeals reflects continued confusion concerning the relationship between a claim of

unfair representation and a claim of breach of contract in the context of grievance administration. As it now stands, a union is free to treat a member of the bargaining unit in any manner it chooses without fear of sanction so long as the grievance is ultimately determined to have no merit. As the lesson of this case teaches, that determination can not be made until the aggrieved employee (as well as the employer and union) have endured nine years of litigation with the attendant time, costs and obstacles that are now placed in the way of relief for a strong claim of unfair representation.

Guidance of this Court is needed concerning the parameters of a union's ability to use a valuable grievance as a bargaining tool to serve ends totally divorced from the interests of the grievants. Conflict among various groups represented by the same union recur on a regular basis and are a common thread in many unfair representation cases. Yet this Court has provided little guidance to the lower courts that grapple with this problem. The issue presented by this case, given the opinion of the court of appeals, is likely to occur on an even more frequent basis than in the past. The problem is highlighted in this case where the trade involves a claim under a collective bargaining agreement for vacation rights defined in a way that is not only common to this industry but to most industries. The import of the court of appeals decision is to require the collective bargaining agreement to be scruti-

nized, not by an arbitrator, but by the federal courts at all levels of trial and appeal.

The petition for Writ of Certiorari should be granted.

Respectfully submitted,

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